

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CENTRAL ENERGY SYSTEMS, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 86-82

FINAL FINDINGS OF FACT,
CONCLUSION OF LAW AND

THIS MATTER, the appeal of Notice and Order of Civil Penalty No. 6424 assessing \$1,000 for alleged violations of regulations concerning asbestos removal, came on for hearing before the Pollution Control Hearings Board; Wick Dufford, Member (presiding), and Lawrence J. Faulk, Chairman, on October 17, 1986, in Lacey, Washington. Respondent elected a formal hearing.

1 Appellant, Central Energy Systems, Inc., was represented by its
2 president, Eugene M. Goosman. Respondent Agency was represented by
3 Keith D. McGoffin, attorney at law. The proceedings were transcribed.

4 Everett Swart, who appealed the same Notice and Order of Civil
5 Penalty failed to appear at the hearing and, on motion of PSAPCA, his
6 appeal was dismissed. (See PCHB 86-84). In Central Energy's appeal
7 witnesses were sworn and testified; exhibits were examined; argument
8 was heard. From the testimony, exhibits and contentions of the
9 parties, the Pollution Control Hearings Board makes these

10 FINDINGS OF FACT

11 I

12 Appellant Central Energy Systems, Inc., is a corporation which is
13 engaged in construction work. It was the general contractor on a
14 demolition and remodeling project for Olympic Printing and
15 Reprographics at 1016 First Avenue South in Seattle, Washington,
16 during January of 1986.

17 II

18 Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a
19 municipal corporation with responsibility for administering a program
20 of air pollution prevention and control in a multi-county area which
21 includes Seattle and the site of the building which is the focus of
22 this dispute.

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25 FINAL FINDINGS OF FACT
26 CONCLUSIONS OF LAW AND ORDER
27 PCHB 86-82

1 PSAPCA has filed with this Board a certified copy of its
2 regulations of which the Board takes official notice.

3 III

4 On January 17, 1986, Central Energy notified PSAPCA that it had
5 found an abandoned steam pipe wrapped in asbetos during demolition at
6 the Olympic Printing building. The contractor requested an "immediate
7 permit" to allow Swart Industries to dispose of the asbestos as soon
8 as possible.

9 On the same day, Everett Swart, dba Swart Industries, filed with
10 PSAPCA a Notice of Intent to Remove and Encapsulate Asbestos,
11 referring to the Olympic Printing site. The notice set forth January
12 19, 1986, as the starting date and January 20, 1986, as the completion
13 date, and stated that 230 linear feet of steam pipe insulation was to
14 be removed. The described removal method involved usage of a "glove
15 bag."

16 IV

17 On January 19, 1986, a Sunday, PSAPCA's inspector arrived at the
18 job site to inspect the asbestos removal operation. Through an opening
19 in a door, a workman was observed in the pipe removal area wearing
20 neither a respirator nor any protective clothing. There was no
21 evidence that the totally contained "glove bag" technique was being
22 used.

1 Mr. Swart was then observed emerging from the loading dock and
2 going to his car. He was wearing protective overalls, half unzipped,
3 and had a respirator hanging around his neck. When told an inspection
4 was to be made of his project, he returned to the building and closed
5 the door, admitting the inspector only some ten minutes later.

6 The warning signs that should have been posted were lying on the
7 ground along with Mr Swart's protective head gear and boot coverings.
8 He was conducting the removal without the head gear or boots.

9 Inside, he had only a small spray bottle on hand for wetting the
10 material. The asbestos materials were not being wetted down adequately
11 to keep the fibers from becoming airborne.

12 A pile of asbestos debris lay adjacent to a pipe on the mezzanine
13 ledge, and another pile of the same debris was found on the ground
14 floor where it had either fallen or been dropped.

15 A bag of asbestos debris was found unsealed and open. There was no
16 containment area. Swart stated that he was conducting no air
17 monitoring and there was no air monitoring equipment on site.

18 Mr. Swart was asked to stop work.

19 V

20 Sample analysis of the pipe insulation showed a high asbestos
21 content. PSAPCA's inspector found considerably more of this insulation
22 on site than had been identified in the Notice of Intent to Remove.

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26 FINAL FINDINGS OF FACT
27 CONCLUSIONS OF LAW AND ORDER
PCHB 86-82

VI

On January 22, 1986, the agency gave written notice to Swart, Central Energy and Olympic Printing and Reprographics that further asbestos removal was to cease until a correct Notice of Intent was received.

Notices of Violation were also issued to these entities, asserting violations of the agency's asbestos handling regulations. These violations were subsequently, on April 18, 1986, made the subject of Notice and Order of Civil Penalty No. 6424, assessing a \$1,000 fine.

The civil penalty notice identified three separate and distinct violations on January 19, 1986 of PSAPCA Regulation I: 1) Deviation from information contained in written Notice of Intent to Remove or Encapsulate Asbestos (linear feet), Section 10.03(d); 2) Failure to adequately wet asbestos materials and contain in a controlled area until collected for disposal, Sections 10.04(b)(ii) and (iii); 3) Failure to adequately wet and seal all asbestos-containing material in leak-tight containers, Section 10.05(iv).

VII

Prior to the Olympic Printing job Central Energy had not been involved in a project requiring asbestos removal. Once the contractors found out about the existence of asbestos, they secured what they assumed was a qualified subcontractor to properly dispose of it.

1 Following the inspection on January 19, 1986 and after subsequent
2 consultation with PSAPCA, a new subcontractor was brought in to remove
3 the remaining asbestos involved in the job. No further difficulties
4 were experienced.

5 VIII

6 Any Conclusion of Law which is deemed a Finding of Fact is hereby
7 adopted as such.

8 From these Findings of Fact, the Board comes to these

9 CONCLUSIONS OF LAW

10 I

11 The Board has jurisdiction over the subject matter and the
12 parties. Chapter 43.21B RCW. The case arises under regulations
13 implementing the Washington Clean Air Act.

14 II

15 Central Energy's position is that they did not intend to commit
16 any violations, that they made every effort to comply through hiring a
17 removal contractor they believed to be a knowledgeable specialist, and
18 that after problems were discovered they corrected them. On these
19 bases they seek elimination or substantial reduction of the penalty.
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III

The Washington Clean Air Act is a strict liability statute and acts in violation of its implementing regulations are not excused on the basis of absence of intent. We conclude that the violations asserted by PSAPCA in assessing the penalty here did occur and that the Central Energy is a proper party to be charged with their violation.

IV

The basis for including Central Energy among those penalized is the principle of non-delegable duty. We have held that in asbestos cases this concept prevents the obligation to comply with applicable standards from being contracted away. Federal Way School District #210 v. PSAPCA, (PCHB 86-164, January 28, 1987); See Sea Farms, Inc. v. Foster & Marshall Realty, 42 Wn. App. 308, 711 P.2d 1049 (1985)

Asbestos is a substance which has been specially recognized for its hazardous properties. It is one of only six pollutants classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous Air Pollutants. It is a substance which by legal definition

causes, or contributes to air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

1
2 Because of the factor of extraordinary, or "inherent", dangerousness
3 we think it appropriate that the duty to meet asbestos handling
4 requirements be treated as non-delegable.

5 V

6 As a general rule, this Board declines to apportion penalties when
7 a violation has occurred and several persons are assessed. Brandel
8 Construction, Lesley Construction and Balser Investments v. PSAPCA,
9 PCHB 85-136, 141, and 154 (November 27, 1985). We decline to do so
10 here. Where vicarious liability is involved, no simple method of
11 apportionment is readily apparent. The parties are in the position of
12 joint tortfeasors, jointly and severally liable for the penalty.

13 VI

14 The extraordinary dangerousness of asbestos also supports the
15 imposition of significant penalties for the violation of procedures
16 designed to protect against the hazard. The civil penalty is intended
17 to influence behavior. We think it vital that all persons associated
18 with projects which involve asbestos removal be induced to exercise
19 the highest degree of care in insuring that the risk of harm to the
20 public be minimized to the greatest practicable degree.

21 Accordingly, we believe that PSAPCA's penalty in this instance
22 should be upheld.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

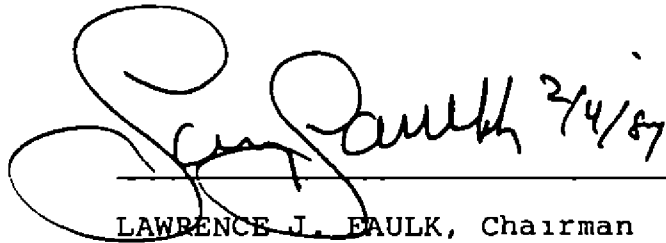
ORDER

PSAPCA's Notice and Order of Civil Penalty No. 6424 is affirmed.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Member



LAWRENCE J. FAULK, Chairman